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No. 305

In the Supreme Court of the United States

OCTOBER TERM, 1951

CITIES SERVICE COMPANY AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Petitioners*

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT

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No. 305

CITIES SERVICE COMPANY AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Petitioners*

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 43) is reported at 93 F. Supp. 408. The opinion of the

United States Court of Appeals for the Second Circuit (R. 55) is reported at 189 F. 2d 744.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1951 (R. 62). The petition for a writ of certiorari was filed on September 8, 1951, and was granted on November 5, 1951 (R. 63). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the provisions of the Trading with the Enemy Act which authorize the vesting of "any property or interest", including "choses in action and rights and claims of every character and description", confer the right to seize and enforce an obligation of a domestic corporation evidenced by a negotiable bearer bond not itself seized.

2. Where the Custodian has vested an obligation determined to be enemy owned, is it necessary to the constitutional validity of the Custodian's action that there be certainly available a remedy to protect the American obligor from the consequence of a foreign court's possible refusal to recognize the vesting.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of the Trading with the Enemy Act, as amended, of Executive Order No. 9193 issued thereunder, and of other pertinent material, are set forth in the Appendix, *infra*, pp. 51-68.

STATEMENT

On March 11, 1949, the respondent, as successor to the Alien Property Custodian,[1] issued Vesting Order No. 12960, 14 F. R. 1405 (R. 8-10). By that order, he vested in himself the debts or obligations evidenced by three Cities Service Company 5% Gold Debenture Bearer Bonds of $1,000 face value each, upon findings that the obligations were owned by, or owing to, a named resident of Germany and national of a designated enemy country. The order further identified the bonds as bearing serial numbers M 23293, M 23318, and M 7029 (R. 8-9). A copy of the order was served on the Company (R. 11) and, by subsequent letters, the Company was directed to cancel two of the bonds which had been called for redemption, and to issue in lieu thereof its check representing the proceeds of redemption with accrued interest. The Company was also directed to cancel the third bond and to issue in lieu thereof a new bond and to have affixed thereto the number of coupons which had not been presented for payment. (R. 13-20.)

One of the bonds (M 23293) had been paid prior to the issuance of the vesting order, and, with respect to this one, the Custodian withdrew his claim

[1] By Executive Order No. 9788 (11 F. R. 11981, October 14, 1946), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the term "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

(R. 32). Neither of the two bonds remaining in issue is in the possession or control of the Custodian. One (M 7029), which was presented for redemption in 1950 and bears a legend of the Custodian's action, is apparently in possession of Dominick & Dominick, a brokerage firm in New York City. The other (M 23318), which was called for redemption in 1947 (R. 15, 25-26, 30), is presently overdue, having matured in 1950. (R. 4, 15.) The present location of this bond is unknown. The bonds were reported to have been in Berlin prior to the issuance of the vesting order. (R. 32-33.)

The Chase National Bank of the City of New York is trustee and paying agent under the indentures under which the bonds were issued (R. 25). Upon the Company's failure to comply with the Custodian's demand, the Custodian instituted the present action under Section 17 of the Trading with the Enemy Act (40 Stat. 425, 50 U. S. C. App. 17), in which the Bank was joined as defendant, seeking payment of the obligations or the issuance of new bonds (R. 3-7). Each party moved for summary judgment (R. 37, 39, 41). The District Court held that the location of the bonds outside the United States placed the obligations they represented beyond the reach of the Custodian's authority, on the ground that the obligations have no existence apart from the bonds (R. 47-48). Accordingly, it granted the petitioners' motions for summary judgment (R. 49-50).

The Court of Appeals reversed and directed summary judgment for the respondent (R. 62). The court held that the Trading with the Enemy Act authorized the seizure and enforcement of obligations of an American debtor evidenced "by bonds outside the country, as well as any of other alien held choses in action" (R. 58). It further held that the power of the United States to do so is not affected by the physical location outside the United States of the bond, so long as the obligor is present in this country. The Court of Appeals also indicated that the petitioners will have a claim against the Government in the event that a foreign court refuses to recognize payment to the respondent as a defense and enters judgment against them in a suit by the bondholder. The court assumed "for argument that, if it were true that [petitioners] remain exposed to such a recovery, and will have no consequent claim against the Treasury for recoupment, a judgment against them will 'take' their property without compensation in violation of the Fifth Amendment" (R. 59). Since the court was satisfied that petitioners would have a claim, it did not reach the constitutional question which it assumed the absence of a claim would raise.

SUMMARY OF ARGUMENT

I

The authority to vest obligations evidenced by domestic bearer bonds appears in the explicit pro-

visions of Section 7(c) enacted in World War I and in the broad grant of power conferred by the World War II amendment of Section 5(b). Section 7(c) confers authority to seize all enemy property, "including * * * choses in action, and rights and claims of every character and description." Section 5 (b), as amended in 1941, authorizes the vesting of "any [foreign] property or interest." The authority to reach bonded indebtedness, even when the bond itself was not seized, was explicitly reaffirmed by Section 9 (n), added to the Act in 1928.

The legislative history of the Act confirms this interpretation of the statutory language. When Congress amended Section 5 (b) in 1940 to authorize the President to prevent transactions in "evidences of indebtedness or evidences of ownership" of property, it also ratified regulations which explicitly covered bearer bonds issued by United States corporations. And when in December, 1941, Section 5 (b) was again amended to authorize the President to vest foreign property, that authority covered the same types of property previously subjected to "freezing" controls.

The seizure during time of war of an obligation evidenced by a bond not itself taken has been sanctioned under confiscation statutes in the early days of the Republic and in the period of the Civil War. Other countries have also permitted the seizure of obligations represented by bearer bonds. Just as

in the case of shares of stock, the mercantile usage and the legal fiction of identifying the obligation with the paper should not be permitted to restrict the exercise of the war powers of the United States. To exempt obligations represented by bonds from the Act's application would do more than provide a sanctuary for enemy investments; it would also defeat the government's recently strengthened program of assisting in the recovery of American securities looted by the Axis during the war.

II

Petitioners have no standing to complain of any injury to their bondholders. In any event, the Act affords adequate remedies to nonenemies whose property is vested and notice by publication of the vesting was sufficient under the circumstances. The Court of Appeals dealt with petitioners' contention that compliance with the Custodian's order might subject them to a second liability in a foreign court by saying that should such a second liability occur petitioners would have the right to just compensation. Since any such second liability is at present conjectural, this Court may feel it unnecessary to decide whether a right to just compensation would be implied in such circumstances. If the question is reached, we submit that there is no necessity to imply a just compensation remedy. The Act expressly exonerates petitioners from liability and that exoneration will have unquestioned

effectiveness within the United States. Congress in 1917 deliberately decided not to attempt to relieve from possible liability abroad persons required to comply with the Custodian's vesting orders. Whether petitioners will be subjected to a second liability abroad is conjectural and there is good reason to believe that at least in the former enemy countries and many of the most important allies of the United States no such liability will arise. In any event, whatever loss petitioners might suffer abroad would be in the nature of consequential damages for which the United States is not obligated to afford a remedy, since it will result directly from the action of a foreign government and only indirectly from that of the United States. The obligation of the United States to protect the property of its citizens abroad is a political one, not cognizable by the courts, and the decision whether to provide other relief is for Congress. Traditionally, post-war claims resulting from wartime seizures have been dealt with in the sphere of diplomacy. The Brussels Agreement, effective in February, 1951, expressly provides that bearer bonds of American issue found in the territory of any of the other signatory nations shall be handed over to the United States.

ARGUMENT

I

The Trading With the Enemy Act Authorized the Custodian to Vest and Enforce the Debts in Suit, Notwithstanding That They Are Evidenced by Negotiable Bearer Bonds Not Themselves Seized.

Section 7(c) of the Trading with the Enemy Act, as it was fashioned during World War I, empowers the President to seize the following enemy interests: "any money or other property, including * * * choses in action, and rights and claims of every character and description." 40 Stat. 411, 418, as amended, 40 Stat. 1020, 50 U. S. C. App. 7(c), Appendix, p. 56. By the World War II amendment to Section 5(b), Congress added the authority to vest "any property or interest of any foreign country or national thereof." Title III of the First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App. 616, Appendix, p. 53. The effect of this amendment was to broaden the Section 7(c) powers which the outbreak of World War II had revitalized.[1] See *Markham* v. *Cabell*, 326 U. S. 404; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 479; *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 485-486, 488.[2]

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[2] The authority under Section 5(b) is delegated to the Custodian by Executive Order No. 9095, March 11, 1942, 7 F. R. 1971, as amended by Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, and Executive Order No. 9567, June 8, 1945, 10 F. R. 6917. See particularly Section 12 thereof. Appendix, pp. 61-62.

By a series of Executive Orders, the powers granted by Section 7(c) have been delegated to the present Custodian.

Unquestionably, the Act authorizes the seizure of "debts." *McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241, 246; *Propper* v. *Clark*, 337 U. S. 472.[3] And the comprehensive statutory language and the scheme of Section 7 leave no doubt of a legislative purpose to include all debts, however evidenced. Thus, Section 7(a) (Appendix, *infra*, p. 54) requires any person "indebted in any way" to an enemy to report the fact to the Custodian. Section 7(b) (Appendix, *infra*, p. 55), which was aimed at transfers to neutrals by enemy obligees, declares that the transferee shall have no right or remedy against the obligor by virtue "of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by * * *

Executive Orders No. 2729-A, October 12, 1917, set out in Meares, *The Trading with the Enemy Act*, pp. 559, 566; No. 2813, February 26, 1918, *id.* p. 584; No. 3016, December 3, 1918, *id.* p. 617; No. 6694, May 1, 1934, 28 C. F. R. (1st ed. 1939) § 4.1; No. 8136, May 15, 1939, 4 F. R. 2044; No. 9142, April 21, 1942, 7 F. R. 2985; No. 9788, October 14, 1946, 11 F. R. 11981.

Section 7(c) is obviously one of the "permanent" sections of the Act. Accordingly, the present Custodian is entitled to the full scope of the powers granted thereby. *Markham* v. *Cabell*, 326 U. S. 404, 423-424 (concurring opinion).

[3] To the same effect: *Mutzenbecher* v. *Ballard*, 16 F. 2d 173 (S. D. N. Y.), affirmed, 16 F. 2d 174 (C. A. 2); *Rumely* v. *United States*, 293 Fed. 532, 548 (C. A. 2), certiorari denied, 263 U. S. 713; *American Exch. Nat. Bank* v. *Garvan*, 273 Fed. 43 (C. A. 2), affirmed *sub nom. Simon* v. *American Exchange Nat. Bank*, 260 U. S. 706; *Miller* v. *Rouse*, 276 Fed. 715 (S. D. N. Y.); *Kohn* v. *Jacob & Josef Kohn*, 264 Fed. 253 (S. D. N. Y.).

an enemy." Section 7(c) (Appendix, *infra*, p. 56), as already noted, authorizes seizure of "any * * * property including * * * choses in action, and rights and claims of every character and description." Section 7(e) (Appendix, *infra*, p. 57), dealing with the discharge of the obligation paid over to the Custodian, provides that the Custodian "shall, in case of payment to * * * [him] of any debt or obligation owed to an enemy * * *, deliver up any notes, bonds, or other evidences of indebtedness or obligation * * * that may have come into [his] possession * * *."[4]

There is nothing in the language of Section 7 which restricts the power to seize debts evidenced by bonds or negotiable instruments to cases where the instruments themselves are seized. Indeed, the wording of Section 7(e), just quoted, clearly contemplates that there will be seizures of bonded debts even when the bonds themselves are not

[4] Since the statutory language is clear, there is little need to refer to the legislative history. See *Ex Parte Collett*, 337 U. S. 55, 61, and cases there cited. Nevertheless, a reference to statements on the floor of the House confirms that the inclusion of debts evidenced by bonds was contemplated from the outset. See *e. g.*, the statements of Representative Esch, a member of the Committee on Interstate and Foreign Commerce, which reported the bill. 55 Cong. Rec., pp. 4864, 4972. See also the observations of Representative Hill who argued against the taking of "stocks and bonds owned abroad" (Idem, p. 4844) and added that in any event private issues should not be given the same treatment as "United States Government bonds in Germany. There * * * the Government has a right to step in * * *." *Idem*, p. 4864.

within reach.[5] The authority to reach a bonded indebtedness without seizure of the bond itself is explicitly recognized by the provisions of Section 9(n) of the Act. 45 Stat. 272, 50 U. S. C. App. 9(n), Appendix, p. 58. That Section was added in 1928 by the Settlement of War Claims Act which provided in general for the return of 80% of all seized property. For the cases where a stock or bond interest had been seized without actual seizure of the stock certificate or the bond, Section 9(n) provided for an 80% return to the current owner of the instrument.[6] By this provision, Congress in terms affirmed the Custodian's power to seize an interest represented by a bond irrespective of whether he had taken the actual instrument.[7]

[5] With respect to other forms of property, reduction to possession is not essential to seizure of title. Seizure of title was effected during World War I by service of a "demand" (*Application of Miller*, 288 Fed. 760, 766 (C. A. 2)), and during World War II by publication of a vesting order in the Federal Register. 8 C. F. R. Section 504.1. Compare *Silesian-American Corp.* v. *Clark*, 332 U. S. 469.

[6] Section 9(n) provides:

> "In the case of property consisting of stock or other interest in any corporation * * * or of bonded or other indebtedness thereof, evidenced by certificates of stock or by bonds * * * where the right, title, and interest in the property (but not the actual certificate or bond * * *) was * * * seized by [the Custodian]," the current owner would be entitled to an 80 per cent return as provided in Section 9(b).

[7] Congressional awareness of the authority to seize stock and bond interests without seizure of the actual instrument

The recent history of Section 5(b) likewise shows an intention to cover bonds, particularly bonds which might otherwise be negotiated abroad. Following the Nazi invasion of Denmark and Norway in April 1940, the President, declaring a national emergency, issued Executive Order No. 8389 (5 F. R. 1400, April 10, 1940) under the authority of Section 5(b), as amended by the Emergency Banking Act of March 9, 1933, 48 Stat. 1. The Order subjected to licensing controls transactions involving funds in which nationals of the invaded countries had any interest, thereby preventing the Axis from swallowing the American assets of such

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is shown by Sen. Rep. No. 23, 70th Cong., 1st Sess., p. 30, which states:

> Subsection (n) meets the situation which has arisen by reason of the fact that certain corporate interests were seized without obtaining custody of the certificate evidencing those interests. As a result the certificate has been sold in Germany and is being dealt in daily on the German exchanges. Although the committee was convinced that it could not adopt a policy of general recognition of assignments, it seems imperative that this situation be met. Accordingly, subsection (n) provides for the recognition of the various assignments and for payment to the present owner of the certificate. In order to prevent evasion, however, it is necessary to limit the return, irrespective of the citizenship of the present owner, to the 80 per cent. * * *

The House Report contains identical language. H. Rept. No. 17, 70th Cong., 1st Sess., p. 21.

nationals.[8] Certificates of stocks and bonds of American corporations, physically located in the invaded countries, constituted a particularly vulnerable class of property. In order to dispel any doubts regarding the application of Section 5(b) to property in such form, the section was amended by the Joint Resolution of May 7, 1940, 54 Stat. 179, to include expressly "any evidences of indebtedness or of ownership of property."[9]

The legislative discussion of the Joint Resolution shows unmistakably a Congressional purpose to reach certificates of American issue located in the overrun areas.[10] Addressing himself to transfers of stock certificates abroad, Senator Barkley, a member of the Banking and Currency Committee, which reported the Resolution, put the case of a foreigner who—

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[8] As other countries were invaded or subjected to the domination of the Axis powers, the controls were expanded so that by June 14, 1941, they extended to all of continental Europe. Proclamation 2487, 6 F. R. 2617, May 27, 1941, Executive Order No. 8389, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897.

[9] There can be no question that bonds were comprehended. See S. Rept. 1496 on S. J. Res. 252, 76th Cong., 3d Sess., and see 86 Cong. Rec. 5179 where Senator Wagner, Chairman of the Banking and Currency Committee, stated: "A bond would be an evidence of indebtedness." See also *United States* v. *Leiner*, 143 F. 2d 298, 300 (C. A. 2).

[10] As to the Congressional purpose to reach transfers abroad, see 86 Cong. Rec. 5906-08, 5168-83; see also Berger and Bittker; *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398, 400-401, fn. 17 (1947).

> * * * has a million dollars' worth of stock in General Motors or the Pennsylvania Railroad: The property represented by the stock is in the United States, but the stock may be in the capital of some nation that has been overrun by the troops of another nation.
>
> * * * * * * *
>
> By coercion, or duress, or some other influence, that stock might be delivered up to representatives of the invading government [86 Cong. Rec. 5178].

Senator Connally added:

> * * * the stock certificate might apparently be properly endorsed. It would not show the coercion. * * * The transfer, the endorsement in blank of the certificate, would not reveal the bayonet sticking up right under the fifth rib of the owner of the certificate. [86 Cong. Rec. 5178.]

Nor was the Congress unaware of the usage of treating the certificates as the property itself. Senator Connally was explicit that, notwithstanding that usage, a transfer of a certificate located abroad was covered by the Resolution and could be recognized only if licensed:

> * * * The bankers have raised the point that if evidences of indebtedness and certificates of stock are presented and are properly en-

dorsed, so far as the surface is concerned, they must accept them, though they may have been obtained by duress or through coercion or fraud. How can anyone object to giving the President, through his proper instrumentality, the right to investigate such a case? If such investigation shows that there was a proper transfer, that it was a transfer for value, that it was a transfer in good faith and upon honorable terms, does anyone contend that the President of the United States would decline permission to transfer the title? [86 Cong. Rec. 5179.]

Moreover, when Congress enacted this Joint Resolution of May 7, 1940, it ratified the freeze order which had already been promulgated by the President (Executive Order No. 8389, *supra*, pp. 13-14) and the Treasury regulations implementing that Order (31 C. F. R. 1943 Cum. Supp. § 130).[11] Those regulations defined "property" to include "any debts, indebtedness or obligations, * * * notes, debentures, stocks, bonds * * * any other evidences of title, ownership or indebtedness, * * * negotiable instruments" (*idem.*, § 130.2(c)). They required reports of "all [foreign-owned] property subject to the jurisdiction of the United States" and spe-

[11] See the terms of the Joint Resolution of May 7, 1940, 54 Stat. 179. The Regulations were set out in full in the Congressional Record and were discussed on the floor of the Senate. See 86 Cong. Rec. 5169-5171.

cifically the reporting by every domestic corporation "with respect to any shares of its stock or any of its debentures, * * * bonds, * * * or other obligations" (*idem.*, § 130.4(a)), including bearer bonds. (*Idem.*, § 130, Appendix B, Pub. Cir. No. 4 § III, class B (7)).

In short, when this country entered the war in December 1941, the Congress had already conferred regulatory powers with respect to American securities, including those located abroad, and had ratified regulations which defined "property" to cover bearer bonds located abroad. Several days after the declaration of war, Section 5(b) was again amended (§ 301, First War Powers Act, 1941, 55 Stat. 839), this time to authorize the President to seize and to make affirmative use of the property already subject to controls. It seems obvious that Congress was not, after this country's entry into the war, excepting from the scope of the Act one particular class of property which it had included while the country was at peace.[12]

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[12] Petitioners' contention that the regulatory and vesting powers conferred by Section 5(b) are not co-extensive (Brief, pp. 24-26) may be correct as far as it goes, but it is irrelevant here. The language of Section 5(b) makes no distinction between jurisdiction to block and jurisdiction to vest on the basis of the type of property involved; any form of property that may be blocked is likewise subject to vesting, if found to be owned by enemy nationals. Similarly beside the mark is petitioners' other contention that in this situation blocking will serve the purposes of the Act better than vesting (Brief, pp. 47, 49-50). The authority granted by Section 5(b) is discretionary (*Clark* v. *Allen*, 331 U. S. 503, 511).

There is not a word in any of these statutory provisions which would warrant attributing to Congress a purpose to except from the broad authority thus conferred the power of the Custodian to seize an interest because it is represented by a negotiable bond or because the holder of the bond is not within the United States. Indeed, to impute such a purpose to Congress would be, *pro tanto*, to frustrate its ultimate aim in enacting the Trading with the Enemy Act:—to permit of seduction "to possession by the United States in furtherance of the war effort" of "any property in this country of any alien." *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 475-476.[13]

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and when Congress has left a choice of means to executive discretion, the exercise of that discretion is not subject to review. *United States* v. *Bush & Co.*, 310 U. S. 371, 379-380.

[13] The significance which petitioners attach to the provision in Section 7(e) requiring the cancellation of stock certificates representing enemy interests and the issuance in lieu thereof of new certificates, is plainly not justified (Brief pp. 22, 27-28). This provision was added by the Deficiency Appropriation Act of November 4, 1918 (40 Stat. 1020), because of the difficulty created by the provision in Section 12 of the Act making the surrender of the old stock certificates a condition of the issuance of new ones. See *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 192-193; *Garvan* v. *Marconi Wireless Telegraph Co.*, 275 Fed. 486, 488-489 (D. N. J.) Cf. *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, 798 (C. A. 2), affirmed, 332 U. S. 469. No such difficulty existed with respect to bonds. In fact, Section 7(e), a part of the Act as originally adopted dealing with the discharge of an obligation paid to the Custodian, provides as to bonds that only those "that may have come into [his] possession" need be surrendered. See also § 9(n), *supra* p. 12.

It is, of course, true that the property of the alien must be "in this country." *Ibid.* And it is submitted that the court below properly held that that requirement was met in this case. An intangible obligation to pay, whether or not evidenced by a bond or negotiable instrument, has no "situs" in the sense of location in space. See *First Nat. Bank v. Maine*, 284 U. S. 312, 328, 332; Powell, *The Business Situs of Credits*, 28 W. Va. L.Q. 39. What matters for purposes of "jurisdiction", as the decisions of this Court have established, is that the obligor is here and can be made to pay. *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428; *Curry* v. *McCanless*, 307 U. S. 357, 365-367; *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174 (overruling *First Nat. Bank* v. *Maine*, *supra*, on other grounds). In a real sense, there is property here which can be effectively dealt with when an obligor is here. *Harris* v. *Balk*, 198 U. S. 215, 222-223; *Chicago, Rock Island etc. Ry.* v. *Sturm*, 174 U. S. 710, 715-716. Cf. *Canada Southern Ry. Co.* v. *Gebhard*, 109 U. S. 527. The bond itself would be substantially worthless if the United States would not enforce its recognition by the obligor.[14]

[14] The presence of the obligor has been held a sufficient basis for the attachment of a debt represented by a negotiable instrument not itself seized, although many states have statutes which have been interpreted not to permit an attachment in the case of negotiable instruments because of a policy against subjecting the obligor to the danger of double liability. See the cases noted in 28 C. J. S. § 102 and 71 A. L. R. 581.

Bank of Jasper v. *First Nat. Bank*, 258 U. S. 112, relied on by petitioners (Brief, 15-17), did not involve the power of a

Petitioners' argument (Brief, pp. 25-26) as to whether the vesting power is limited to property "subject to the jurisdiction of the United States" (Section 5(b)) or to property "within the United States" (Executive Order 9193) is beside the point. For purposes of this case there is no need to choose between the two phrases. Even if we assume for argument that the language quoted from Executive Order 9193 governs and that it is narrower in scope than the wording of Section 5(b), still the obligation evidenced by the bonds in question is property "within the United States" because the obligor is here and can be made to pay.

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state to authorize the "seizure", such as an attachment, of an underlying obligation by the creditor of a holder of negotiable paper. That case merely concerned the power of a court "to determine the liability of maker to holder" where neither the holder nor the instrument was within the court's jurisdiction.

The absence of World War I cases involving domestic bearer bonds located abroad has not been due to any supposed lack of authority with respect to such bonds. At that time, vesting of bonded debts without seizure of the instruments was the exception because of the difficulty of adequate identification. This difficulty, however, has to a large extent been overcome in World War II by the requirement of the Allied occupying powers that such property be reported by the enemy. Thus, the enemy ownership and serial numbers of the bonds can be readily established. Furthermore, any problem arising out of World War I seizures became to a large extent academic because of the post-war legislation authorizing returns of seized property, as, for example, the Settlement of War Claims Act of 1928 (45 Stat. 254) which, among other things, added Section 9(n) to the Trading with the Enemy Act, see p. 12, *supra*.

While the exact question before the Court has not previously arisen under the Trading with the Enemy Act, it has been presented under earlier confiscation statutes. The fact that a debt was evidenced by a bond not itself taken was not regarded of any consequence for purposes of wartime seizure. See *Ware* v. *Hylton*, 3 Dall. 199, 219-220, 264-265; *Miller* v. *United States*, 11 Wall. 268, 296; *Alexandria* v. *Fairfax*, 95 U. S. 774, 779; *Brown* v. *Kennedy*, 15 Wall. 591; *Pelham* v. *Way*, 15 Wall. 196, 201-202.

Other countries, notably South Africa, Great Britain, and Canada, have taken the same position. *Randfontein Gold Mining Co.* v. *Custodian of Enemy Property*, [1923] So. Afr. L.R., App. Div. 576; *Sutherland* v. *Administrator of German Property* [1934] Court of Appeal, 103 L.J. (K.B.) 244, [1934] 1 K.B. 423, 50 T.L.R. 107, 150 L.T.R. 247; *Canadian Revised Regulations Respecting Trading with the Enemy* (1943).[15] In the *Randfontein* case, *supra*, the South African Custodian vested negotiable bearer shares and bearer bonds of a domestic gold mining company. They were

[15] The Canadian regulations provide for the vesting of "all enemy property." (Reg. 21 (1)). "Property" is defined to include securities (Reg. 1 (i)) which in turn are defined to extend to:

> • • • bonds, debentures • • • or other obligations or rights, whether registered or in bearer form • • • and whether the place of registration or the situs of the certificates or other instruments representing the securities is in Canada or not. [Reg. 1(g)].

held subject to seizure as enemy property even though the certificates were located elsewhere. There, as here, the company refused to comply with the Custodian's demand for the issuance of duplicate certificates, claiming that commercial usage treated the bond as the property and that therefore the property was not within South Africa. That contention was not sustained. It was enough, the Court pointed out, that the corporate debtor by virtue of its existence in South Africa could be made to pay there.

In the analogous situation of the seizure of intangible obligations represented by stock certificates, this Court has upheld the authority of the Custodian to seize though the certificates are beyond his reach: *Silesian-American Corp.* v. *Clark*, 332 U. S. 469; *Great Northern Ry.* v. *Sutherland*, 273 U. S. 182. The same result has been reached even when the certificates are endorsed in blank and hence pass by delivery. *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C. A. D. C.); *B. & O. R. Co.* v. *Sutherland*, 18 F. 2d 560 (C. A. 4).[16]

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[16] If the Act confers upon the Custodian the authority to vest the obligations in suit, there can be no question of his power to require cancellation of the outstanding bonds and the issuance of new ones. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469. Nor can the provisions of the indentures under which the bonds were issued or those of the Negotiable Instruments Law justify the failure to comply with that requirement. Those provisions do not purport to preclude the exercise of paramount governmental power. "Federal officers and Federal courts are not dependent upon State legislation

For purposes of seizure under the Trading with the Enemy Act, no distinction is warranted between stocks and bonds. The Uniform Stock Transfer Act codifies the mercantile usage of identifying shares of stock with the certificate and of treating the certificate as the property.[17] Yet this does not prevent the seizure during time of war of the underlying shares even though the certificate itself is beyond reach. Commercial convenience should not be permitted to do so in the case of bonds.

The rule that the bond itself is to be treated as the property, and that the "situs" of the obligation

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for power to lay hold of property." *Miller* v. *United States*, 11 Wall. 268, 297; *Columbia Brewing Co.* v. *Miller*, 281 Fed. 289, 291 (C. A. 5). If any provisions of state law, such as the Negotiable Instruments Law or the Stock Transfer Act, are inconsistent with the exercise of that power they must yield. *Silesian-American Corp.* v. *Clark, supra; Gt. Northern Ry.* v. *Sutherland*, 273 U. S. 182; *Central Hanover Bk. & Trust Co.* v. *Markham*, 68 F. Supp. 829, 831-832 (S. D. N. Y.).

[17] The "fundamental purpose of the whole Act" is to make the certificate, "to the fullest possible, the representative of the share." This "is in accordance with the mercantile usage." Commissioners' Note, 6 U. L. A., p. 2. See also 6 U. L. A. §§ 1, 5, 6, 7(d)(1), 13. For cases in which courts in many contexts have treated the certificate as the property and accordingly have held that shares are not within the "jurisdiction" where the certificates are beyond reach, see *Guaranty Trust Co.* v. *Fentress*, 61 F. 2d 329 (C. A. 7); *Klein* v. *Wilson & Co., Inc.*, 7 F. 2d 769 (D. N. J.), affirmed, 7 F. 2d 777 (C. A. 3); *Elgart* v. *Mintz*, 123 N. J. Eq. 404, 197 Atl. 747. See also *Iron City Savings Bank* v. *Isaacsen*, 158 Va. 609, 635-636, 164 S. E. 520, 528-529.

is the location of the paper, is admittedly a fiction and a statement of the results courts have reached in other contexts for reasons of policy. See the dissenting opinion of Justice Stone in *First National Bank* v. *Maine*, 284 U. S. 312, 332; overruled by *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174. The concept of "situs" is not to be employed to thwart the policy of the United States. *United States v. Pink*, 315 U. S. 203, 234, 240.

In the case of the Trading with the Enemy Act, the purpose of the seizure provisions, as this Court has repeatedly declared, was to reduce to possession all enemy property that can be reached so as to prevent enemy use thereof and to permit affirmative use by the United States. *Propper* v. *Clark*, 337 U. S. 472, 481, 484; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469; *United States* v. *Chemical Foundation*, 272 U. S. 1, 9-10. And it is settled that a commercial practice which conflicts with this purpose must yield. *Silesian-American Corp.* v. *Clark, supra; Great Northern Ry.* v. *Sutherland*, 273 U. S. 182. This may necessitate "some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the nation's interest." But that fact has not prevented the courts from giving "generous scope" to the power under the Act "to accomplish its purpose." *Propper* v. *Clark*, 337 U. S. 472, 481-482; see also *United States* v. *Chemical Foundation*, 272 U. S. 1,

9-10; *Salamandra Ins. Co.* v. *N. Y. Life Ins. & Trust Co.*, 254 Fed. 852, 860 (S. D. N. Y.).[18]

Implicit in this case are questions of importance far beyond the two bonds here involved, indeed far beyond the large quantities of such property owned by enemies. This case may also determine whether vast amounts of American securities looted by the aggressors from the invaded countries will be permitted to be unloaded. It was precisely with respect to such securities that the federal government's wartime foreign funds control or "freezing" program, although generally relaxed since the surrender of Germany and Japan, has been continued in effect down to the present.[19] Indeed, in accordance with this country's reiterated intention to frustrate the attempts of the enemy and persons dealing with the enemy to profit from wartime loot,[20] the federal government only re-

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[18] Coupons unmatured at the date of vesting, being "mere incidents of the bonds" (*Williamsburgh Sav. Bank* v. *Town of Solon*, 136 N. Y. 465, [illegible] 32 N. E. 1058, 1062), would seem to be covered by the l[illegible]ge of the vesting order: "any and all rights in, to and [illegible]er said bonds" (R. 8-9). *Cf. Great Northern Ry.* v. *Sutherland*, 273 U. S. 182.

[19] As to the general relaxation of freezing controls, see Alk and Moskovitz, *Removal of United States Controls over Foreign-Owned Property*, 10 Fed. Bar Journal 3 (1948).

[20] *Inter-Allied Declaration Regarding Forced Transfers of Property in Enemy Controlled Territory of January 5, 1943*, Department of State Bulletin, Vol. VIII, No. 185, p. 21; *Resolution No. VI of the United Nations Monetary and Financial Conference at Bretton Woods*, July 1-22, 1944, Department of State Bulletin, Vol. XI, No. 276, p. 384.

cently has strengthened its controls over securities of American issue identified on a schedule, first promulgated in July 1947, as having been looted.[21] All such securities, in which trading is forbidden, are required to be deposited with the Federal Reserve Bank of New York within a specified period of time. And this applies to domestic scheduled securities, wherever located. The Secretary of State and the Attorney General jointly announced, upon issuance of the new amendment to the foreign funds control regulations, that its purpose is "to enable completion of the program of assisting in the recovery of securities looted by the Germans during the war." Holders who fail to deposit such securities within the required time, the announcement adds, "will face vesting action * * * which will nullify their rights in those securities."[22] In accordance with this program, undeposited securities appearing on the schedule were vested effective October 2, 1951 (Vesting Orders Nos. 18519-18521, 16 F. R. 10097-10102). In a press release accompanying this action, the Attorney General advised that representatives of the "victims of the German looting" are expected to "file claims for the return of [such] securities * * *. Any other person who claims to have any interest in the

[21] General Ruling No. 5B, January 20, 1951, 16 F. R. 539.

[22] Press Release, Department of Justice, January 19, 1951, reprinted in full in the Appendix, pp. 62-66.

vested securities may also file a claim for the return of his interest."[23]

This program rests on the authority conferred by Section 5(b) of the Trading with the Enemy Act. Accordingly, to apply the fiction of treating the paper as the property in this context would do more than provide a sanctuary for enemy investments. It would permit the speculator, who purchased looted securities from the enemy at a heavy discount in the hope of salvaging on them after the war, to win his gamble, and would leave this government without power to render effective assistance to the former owner in the recovery of such securities. This result is certainly not required by the statute.

II.

The Application of the Act to Bearer Bonds Raises No Constitutional Question.

Petitioners suggest (Brief, pp. 32-51) that the application of the seizure provisions of the Trading with the Enemy Act to obligations evidenced by bearer bonds raises two constitutional questions: (1) it may take the property rights of alien friends without compensation and without due process of law; and, (2) it may violate the Fifth Amendment by exposing petitioners to a second and therefore double liability abroad for which they could not recover compensation from the United States.

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[23] Press Release, Department of Justice, October 4, 1951, reprinted in full in the Appendix, pp. 66-68.

A. *Petitioners Have No Standing to Complain of Any Injury to the Bondholders.*

The short and sufficient answer to the first suggestion is that petitioners have no standing to raise the point. As obligors, they have no property in the vested obligations and no authority to assert whatever rights the obligees have. In an analogous situation, this Court has held that a corporation has no standing to assert the interests of its shareholders. *Stoehr* v. *Wallace,* 255 U. S. 239, 251; *Silesian-American Corporation* v. *Clark,* 332 U. S. 469, 474.[24]

Notwithstanding, petitioners contend (Brief, pp. 33-35) that notice to the holder of the bond by publication in the Federal Register is so inadequate as to invalidate the seizure. The efficacy of the vesting as a seizure, however, would seem to depend upon the notice to the obligor rather than to the obligee. In any event, publication is adequate under the circumstances. A *res* vesting under the Trading with the Enemy Act takes the interests of all persons, wherever located and whether known or unknown. *Stern* v. *Newton,* 180 Misc. 241, 39 N. Y. S. 2d 593. In similar situations, like that of escheat, notice by publication is held sufficient. *Security Bank* v. *California,* 263 U. S. 282, 289-290.

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[24] Petitioner has even less standing to object to the 2 year period of limitation. Section 33 applies to suits under Section 9(a) by parties claiming an "interest, right, or title" in the property vested.

The Constitution does not require personal service upon unknown claimants. *Tyler* v. *Court of Registration,* 175 Mass. 71, 75, 55 N. E. 812, 813, writ of error dismissed, 179 U. S. 405. Where petitioners have cast their contract in a form which enables the obligee to remain anonymous, and unknown even to the obligor, then notice by publication is "appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 313. By choosing a particular form of contract the parties may not remove their transaction from the reach of the Constitutional power of Congress. *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 307-308. Indeed, by the terms of the Indentures under which these bonds were issued, publication in an "authorized Manhattan newspaper" is all the notice that is required to affect substantial rights of the holders. Such notice is sufficient to call the bonds for redemption prior to maturity and to void coupons maturing subsequent to the redemption date. (See Art. IV of each Indenture. For the sufficiency of notice by publication for other purposes, see Art. XII of each Indenture.)

In any event, as to the two bonds in issue, the ordinarily diligent holder would receive actual notice of the vesting and would have sufficient time to protect his rights by appropriate claim or suit under the Trading with the Enemy Act (Secs. 9, 32). The interest on each of the bonds is payable semi-annually (see Art. II, Sec. 2 of each Inden-

ture). In addition, one of the bonds (M 7029) was presented for redemption on January 5, 1950, and bears a legend of the Custodian's action (R. 32-33). The other (M23318) was called for redemption in 1947 (R. 15, 25-26, 30) and matured in 1950 (R. 4, 15). Under these circumstances, the holder was given "a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings * * *." *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 562.

B. *The United States Is Not Required to Protect Petitioners Against Possible Imposition of Liability Abroad.*

The Court of Appeals dealt with petitioners' second suggestion by assuming, without deciding, that, if petitioners remained exposed to a second recovery abroad and would have no claim against the Treasury for recoupment, a judgment against them would "take" their property without compensation in violation of the Fifth Amendment. The court met this assumed difficulty by deciding that the petitioners would be entitled to just compensation under those circumstances. (R. 59-60.)

We think there is no necessity for implying such a remedy. The Trading with the Enemy Act expressly exonerates petitioners from any liability, and that exoneration will unquestionably be effective within the United States; it thus affords all the protection that is either possible or necessary in a wartime statute. Any damage that petitioner might suffer by reason of action taken abroad

would be consequential and conjectural, of a type for which the United States is not obliged to provide a remedy. And the question whether and to what extent the United States should protect our citizens from action taken abroad is essentially a political question.

At the outset, we point out that this Court may find it unnecessary to reach the issues raised by this implication of a just compensation remedy. Whether the double liability of which the Court of Appeals spoke will ever arise is conjectural in any case and especially so on the facts of this case (see *infra*, pp. 38-51). In general, this Court "will not anticipate a question of constitutional law in advance of the necessity of deciding it," *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-7 (concurring opinion); cf. *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 476.

The issue of just compensation raised by the opinion below, however, raises important questions under the Trading with the Enemy Act. Nothing in the discussion of the point by the court of appeals limits the suggested right to cases involving negotiable instruments; indeed, the very reach of the argument suggests its unsoundness. No reason appears why a second liability abroad might not occur in every instance in which any bailee, trustee, agent, or obligor complies with a vesting order, if he or his property subsequently comes within the jurisdiction of a foreign court. No matter what

type of property is involved, recognition of the seizure and the statutory discharge from consequent liability will still be decided by the foreign court according to its own notions of law and public policy. (See e.g. cases cited at Pet. Br. 37, n. 3.) Because of the importance of the question, and because the court below apparently deemed it necessary to reach it, we shall, in the remainder of this Brief discuss in detail the reasons why we believe the proposed remedy of just compensation is neither proper nor necessary.

1. *The Trading with the Enemy Act exonerates petitioners from liability to the fullest extent necessary.*—During the House hearings in 1917 on the original Trading with the Enemy Act the specific question whether the provisions of the Act would protect obligors against liability abroad was raised, and answered in the negative.[25] The bill was

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[25] This appears in the testimony of Assistant Attorney General Warren before the House Committee on Interstate and Foreign Commerce. *Hearings on H. R. 4704, Committee on Interstate and Foreign Commerce, 65th Congress, 1st Sess.*, p. 42:

> Mr. Parker: Does the law say that the debtor should be discharged so that if he goes abroad after the war he cannot be sued?
>
> Mr. Warren: No.
>
> Mr. Parker: Should it not? . . .
>
> Mr. Warren: I do not think it is necessary. We considered that question. We had it in one draft of the bill and finally omitted it.
>
> Chairman: That is the effect of the bill?
>
> Mr. Warren: Yes, sir; precisely; that is the effect of the bill itself.

passed, nevertheless, and the action of Congress would seem to justify the inference that in its judgment protection against a second liability in a foreign court was not necessary to constitutionality.

What Congress did was to give complete protection in every court in the United States to the obligor, bailee, agent, trustee, or other person who should comply with the orders of the Custodian. Sections 5 (b) (2) (*infra*, p. 54) and 7 (c) (*infra*, p. 57). There is no doubt that these sections adequately protect the petitioners against a suit within our territory by a holder of these bonds. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469; *Great Northern Ry.* v. *Sutherland*, 273 U. S. 182; *American Exch. Nat. Bank* v. *Garvan*, 273 Fed. 43, 47 (C. A. 2), affirmed *sub nom. Simon* v. *American Exch. Nat. Bank*, 260 U. S. 706.

In addition, Congress provided that any non-enemy claiming any "interest, right, or title" in

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Mr Sims: Suppose he should go abroad—to the enemy country—and be sued over there, his having paid it to the Federal government of the United States would not deprive the courts of the enemy country of jurisdiction?

Mr. Warren: And no more if the Congress of the United States should put in this clause relieving him.

Mr. Sims: It would have absolutely no effect?

Mr. Warren: That is a matter which must be considered in connection with the treaty provisions.

Mr. Montague: We cannot enact a law which would have extra-territorial effect?

Mr. Warren: No.

property seized or vested by the Custodian might sue for its return under Section 9 (a). The remedy under Section 9 (a) is exclusive (Secs. 7 (c), 9 (f)), and provides only for the return of the property mistakenly vested or its proceeds; it does not provide for payment of just compensation. *Pflueger* v. *United States*, 73 App. D. C. 364, 121 F. 2d 732, certiorari denied, 314 U. S. 617.[26] Yet this Court has held, since 1921, that the remedy provided in Section 9 (a) is as broad as the requirements of the Constitution. *Staehr* v. *Wallace*, 255 U. S. 239; *Becker Co.* v. *Cummings*, 296 U. S. 74; *Clark* v. *Uebersee Finanz-Korp., A. G.*, 332 U. S. 480.[27] In no reported decision, save that of the Court of Appeals in the present case, is there, as far as we have been able to determine, any sug-

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[26] It has also been held that there is no remedy under the Tucker Act. *Duisberg* v. *United States*, 116 Ct. Cl. 861, 89 F. Supp. 1019, certiorari denied, 340 U. S. 890.

[27] In *Clark* v. *Uebersee Finanz-Korp., A. G.*, the Government, urging that the Act be construed to authorize retention of property of foreign nationals, suggested that as to foreign nationals whose property could not constitutionally be confiscated, the vesting would amount to a "taking" in the constitutional sense for which just compensation should be paid. The Court rejected that contention, holding that Section 9(a) retained its original function as the exclusive and constitutionally adequate remedy under the Act.

gestion that the possibility of a second liability abroad requires any additional remedy.[28]

We find nothing in the implications of the opinion of this Court in *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, to support such a suggestion. This Court, in referring to possible just compensation, was not talking about the remedies of an obligor who paid the Custodian; it was concerned with the remedies available to one whose property had been vested. Moreover, the references in that opinion to "compensation" (332 U. S. at pp. 476, 479-480) would seem to refer to property of friendly aliens which might be requisitioned or commandeered by the United States before the outbreak of war in "reasonable preparation for the storm of war". Before the declaration of war no owner would be an "enemy" within Section 2 of the Act, and the provision of Section 9(a) permitting suit by "any person not an enemy or ally of enemy" would not apply. Presumably in such a situation some provision for compensation would be made.

Of course, the Trading with the Enemy Act does not afford relief for every variety of loss or damage that may result from a vesting, yet it is a con-

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[28] *Ingenohl* v. *Olsen & Co.*, 273 U. S. 541, cited by petitioners (Brief, pp. 39-40), is no exception. Decided at the same term as *Great Northern Ry.* v. *Sutherland*, 273 U. S. 182, that case involved, not an obligor who paid the Custodian, but a purchaser from the Custodian.

stitutional exercise of the war power of the United States:

> As between the Custodian and citizens, section 9 is enough * * *; so far as they may suffer injury, which that section does not meet, it is a loss that cannot be cured without undue impediment to the national power. [*Kahn* v. *Garvan*, 263 Fed. 909, 916 (S. D. N. Y.).]

2. *Any injury that petitioners may suffer is consequential and conjectural, for which Congress is under no obligation to provide a remedy.* Petitioners suggest (Brief, pp. 35-40) that the vesting of the obligations represented by the bonds in question may be contrary to the Fifth Amendment because the Act does not provide for compensation. The opinion of the Court of Appeals indicated that there would be a taking, but only if and when there should be a recovery on the bonds in a foreign court (R. 59-60).

The difficulty with both of these approaches is to find a "taking". What is taken by the vesting order is the right to receive payment of the bonds, which is the property of the holders, not of the petitioners. If the holders of the bonds are not enemies, they have their remedy under Section 9(a); if they are enemies, there is no obligation to pay compensation to them. *Cummings* v. *Deutsche Bank*, 300 U. S. 115; *Hijo* v. *United States*, 194

U. S. 315; *Deutsch-Australische, etc.* v. *United States*, 59 Ct. Cl. 450, certiorari denied, 277 U. S. 610.

By the vesting, the respondent succeeded to all the rights of the holder "as completely as if by conveyance, transfer or assignment". *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 56. The payment of the amount of the obligations by the petitioners to the respondent will not constitute a taking for by force of the statute the respondent is a "person duly authorized" to receive payment (*Security Bank* v. *California*, 263 U. S. 282, 285-286) and the petitioners will merely be satisfying contractual obligations they assumed in 1929 and 1930 when they issued the bonds.

Petitioners' argument to the contrary (Brief, pp. 31-32)—that by the vesting the Custodian is calling into being a non-existent obligation and to that extent "takes" their rights, because they never agreed to pay other than in accordance with the indentures—proves too much. To accept that argument would invalidate transfers by operation of law and all vestings under the Act, at least of choses in action. An agreement to pay to "bearer" is no more insulated from the act of the sovereign than an agreement to pay to a named person or to pay in gold. Cf., *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 307-308.

For the reasons just stated, there is on the effective date of the vesting order no "taking" of peti-

tioners' property in the sense of a direct invasion or appropriation.

The Second Circuit did not suggest that either the vesting or the payment to the respondent would in and of itself amount to a "taking"; the suggestion of that court was that the payment to the respondent would become a "taking" only if and when respondents should be compelled to pay a second time in a foreign court. What will immediately work the taking will not be the action of the United States but the subsequent action of a foreign country through its courts. At most, what the United States has done is to create a condition in which such an injury may later come to the petitioners. We have been unable to discover any authority for the proposition that subsequent action by an independent power will make a taking out of what the United States has done within the scope of its constitutional powers.

The loss to the petitioners, if and when it occurs, is not made up of the payment to the respondent but of the second payment abroad; it is property other than that which the United States has received. Such a second recovery abroad is at present entirely hypothetical and conjectural. Any such liability with respect to either of the bonds in suit is extremely unlikely. Bond M 7029 is now held by a New York brokerage house and has been stamped with a legend giving notice of the vesting order (R. 32-33). The other bond, M. 23318, the

whereabouts of which are unknown, is now overdue, having matured in 1950 (R. 33, Indenture of June 2, 1930, p. 1).

Moreover, even if suit is brought abroad on the missing bond or on some other bond the obligation of which has been vested, a second liability of petitioners will eventuate only if there is a rather remarkable coincidence of circumstances. The assumed plaintiff must establish that he is a holder in due course. See, *State of the Netherlands* v. *Federal Reserve Bank*, 99 F. Supp. 655 (S. D. N. Y.). The courts of the country in which he sues may apply the law of the United States, since the bonds were issued here and are payable here, and may recognize the payment to the Custodian as a defense, as the foreign decisions cited in *Compania de Inversiones Int.* v. *Industrial Mortgage Bank*, 269 N. Y. 22, 198 N. E. 617, did with the "gold clause" legislations of 1933.[29] Of course, whether

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[29] The bonds in question are "gold" bonds, issued in 1929 and 1930. Presumably petitioners would contend that the 1933 legislation was a defense to an action abroad to force payment in gold, while they contend here that the Trading with the Enemy Act, which has been on the statute books since 1917, has no application.

But if the obligation is "subject to the jurisdiction of the United States", so as to permit one statute to work a substantial change in value in 1933, it would also seem "subject" to the extent that another statute in 1949 could require payment to the Custodian in lieu of the holder. In each case, what the statute affects is the obligor-obligee relationship, and in neither case could acquiescence of foreign courts be guaranteed.

the courts of another nation will give any effect to to the provisions of the Trading with Enemy Act is a question they will decide according to their own system of law and their ideas of public policy. See, Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws,* 56 Harv. L. Rev. 30 (1942); Rabel, *Situs Problems in Enemy Property Measures,* 11 Law & Contemp. Prob. 118 (1945). No general statement can be made as to the policies of other nations in which bonds may appear, but the suggestion seems justified that the number of other countries in which petitioners may be subjected to a second liability is not so large as the Court of Appeals seemed to think.

The courts of the nations which are signatories to the Brussels Agreement, discussed *infra,* p. 47, would seem bound to recognize payment to the Custodian as a discharge. It is not unlikely that the courts of other nations which were allied with the United States in the war may do the same, even though their past holdings as to such recognition may be to the contrary. Rabel, *op. cit.,* pp. 123-124. See, *Anderson* v. *Transandine Handelmaatschappij,* 289 N. Y. 9, 43 N. E. 2d 502. And compare *Lorentzen* v. *Lydden & Co.,* [1942] 2 K. B. 202, with *Wolff* v. *Oxholm,* 6 M. & S. 92, 105 Eng. Rep. 1177, and *Ogden* v. *Folliott,* 3 T. R. 726, 100 Eng. Rep. 825. As to the courts of enemy nations, it may be expected that the matter will be taken care of, as it has been in the past, by treaty (see *infra,* pp. 47-49).

So the second liability of petitioners is likely to come to pass, if it does, only if a holder in due course sues them in the courts of a nation that was neutral during the war and which does not admit in its notions of public policy the legality of seizures under the Act, and if in that country the petitioners are amenable to process either by doing business or by having attachable property there.

It is settled that the Fifth Amendment does not bind the United States to indemnify its citizens against losses they may incur by obeying its lawful commands. *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188, 190. Nor is action by the United States which causes "conjectural" or unforeseeable loss compensable under the Amendment. *Sanguinetti* v. *United States*, 264 U. S. 146, 149; *Horstmann Co.* v. *United States*, 257 U. S. 138. Also, if the United States acts within the scope of a constitutional power other than that of eminent domain, although the effect may be to impair substantially or even destroy the value of unappropriated property, there is not a "taking". *Sanguinetti* v. *United States, supra; Omnia Co.* v. *United States*, 261 U. S. 502, 510; *Mitchell* v. *United States*, 267 U. S. 341, 345. Nor is there a "taking" within the Fifth Amendment if the injury or loss to the property of the owner follows only indirectly from the action of the United States; damage which is "incidental", "indirect", or "consequential", however large the amount, does not amount to a "tak-

ing". *Bedford* v. *United States*, 192 U. S. 217, 225; *Mullan Benev. Corp.* v. *United States*, 290 U. S. 89, 94; *Danforth* v. *United States*, 308 U. S. 271, 286.

Eighty years ago this Court, in a case where the injury followed more nearly immediately and directly from the action of the United States, rejected the idea that the just compensation clause of the Fifth Amendment bound the United States to indemnify its citizens for losses. Speaking through Justice Strong, it said:

> That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? [*Legal Tender Cases*, 12 Wall. 457, 551.]

The suggestion that an implied obligation of the United States to pay just compensation can be

created by the action of a foreign government or court is a novel one and runs counter to established doctrines. It has not been before suggested that the possibility of a second liability in a foreign country may inhibit action otherwise lawful by the United States or by a State. A foreign court which would refuse to recognize the discharge granted by the Act might also impose a second liability in cases in which the proceeding in the United States took the form of escheat,[30] garnishment,[31] bankruptcy or corporate reorganization,[32] or a withholding tax. "Double liability" in this sense is not unusual; it is an inevitable consequence of the fact that there is no international full faith and credit clause. While such a lack may be one of many respects in which present-day international organization is defective, we know of no basis on which it can be said to create an obligation on the part of the United States to pay compensation.

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[30] See *Security Bank* v. *California*, 263 U. S. 282; *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233; *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428.

[31] Beale, *The Conflict of Laws* (1935) §§ 108.1 108.4.

[32] Before the days of a federal bankruptcy act a discharge in a state court of insolvency was not good as against nonresident creditors. *Baldwin* v. *Hale*, 1 Wall. 223. And see *Gibbs* v. *Société Industrielle et Commerciale Des Métaux*, 25 Q. B. D. 399. Cf. *Canada Southern R. v. Gebhard*, 109 U. S. 527.

3. *The decision is for Congress whether petitioners should be reimbursed for a liability abroad.*

The decision whether to grant or deny relief for liability or loss abroad is for the "political departments"—the Congress and the Executive—and that decision raises no issue which requires judicial determination. So this Court held in an early "withholding tax" case, *Railroad Co.* v. *Collector*, 100 U. S. 595. An Act of 1866 levied a tax of 5 per cent on the interest paid by railroads on bonds, including that paid to non-residents and aliens. The Act authorized the railroad to deduct the tax paid and withhold it from the payment to the bondholder, and provided that the company would be discharged to that amount. The company paid the tax but also paid the interest (in London) without deduction. It then sued for the return of the tax on the grounds that the provision for deduction and discharge was invalid and that the tax was on non-residents. The Court upheld the tax, saying, in an opinion by Justice Miller (100 U. S. at 598-599):

> Whether, as a question of international law, this declaration would relieve the corporation from the obligation to pay its foreign bondholder the full sum for which it contracted, we need not discuss; for this court, on all such subjects, is bound by the legislative and political departments of its own government. * * * being lawfully assessed and paid, it

cannot be recovered back by reason of any inefficiency or ethical objection to the remedy over against the bondholder.

The same result was reached in *United States* v. *Erie Railway Company*, 106 U. S. 327, in which the United States prevailed in a suit to collect the tax on the authority of *Railroad Co.* v. *Collector, supra.* Justice Bradley, in a concurring opinion (106 U. S. at 703) in which Justice Harlan joined, said as to the objection that the payment of the tax and consequent discharge here might not be respected by foreign governments, that it went only to the propriety or expediency of the tax and was a matter for Congress to decide.

Petitioners attempt to distinguish these cases as dealing only with the problem of the "incidence of taxation" (Brief, pp. 38-39). However that may be, the result reached in those cases accords with the well established rule that the obligation of the United States to protect its citizens or their property abroad is a "political" one, exercised in the discretion of the Executive; it is not a legal obligation enforcible in the courts. See *Shapleigh* v. *Mier*, 299 U. S. 468, 471; Borchard, *Diplomatic Protection of Citizens Abroad* (1927), §§ 15, 138, 143-144, 149, 154. Cf. *Blagge* v. *Balch*, 162 U. S. 439, 454, 457. This is a corollary to the rule that when the citizen goes abroad or sends his property, he submits to the jurisdiction of the laws and courts of the foreign country. *Underhill* v. *Her-*

nandez, 168 U. S. 250, 252; Borchard, *op. cit.,* §§ 14, 128; VI Moore, *A Digest of International Law* (1906), pp. 249, 696; II Hackworth, *Digest of International Law* (1941), p. 71. Among other risks he takes that of the loss of his property in the event of war. *Submarine Signal Co.* v. *United States,* 61 Ct. Cl. 652, certiorari denied, 273 U. S. 713; *Green* v. *United States,* 10 Ct. Cl. 466, 471; Cf. *Clark* v. *Williard,* 294 U. S. 211, 213; *Disconto-Gesellschaft* v. *Umbreit,* 208 U. S. 570, 579-580. And, since the decision whether and how to protect the citizen involves the relations of the United States with other nations, it is a "political" one. Moore, *op. cit.,* p. 695. Cf. *United States* v. *Curtiss Wright Corp.,* 299 U. S. 304, 318; *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.,* 333 U. S. 103, 111.[33]

Traditionally, the problem of the protection of the citizen abroad against post-war claims resulting out of wartime seizures has been dealt with on the diplomatic level. To that end, in 1950 Congress added Section 40 to the Trading with the Enemy Act, Act of September 28, 1950, 64 Stat. 1079 (50 U. S. C., Supp. IV, 40). That section authorizes the negotiation of agreements to settle "intercus-

[33] Congress has on occasion, to promote specific objectives, authorized the United States to assume some or all of the special risks incident to doing business abroad. *Cf.* The E. C. A. guarantee program, Sec. 111(b) of the Economic Cooperation Act of 1948, 62 Stat. 143, as amended, 64 Stat. 198, 22 U. S. C., Supp. IV, 1509(b). It deliberately chose not to do so in the Trading with the Enemy Act. See pp. 32-

todial conflicts" concerning enemy property. The United States has entered into one such agreement, the Brussels Agreement of December 5, 1947, to which the United States and Belgium, Canada, Denmark, Luxembourg, and the Netherlands are parties, and which became effective February 1, 1951. That agreement deals specifically with the problem presented by bearer bonds which have been issued by one or more parties to it. Article I of the Annex defines a "security" to include bonds, "whether in registered or in bearer form", and provides that the certificate shall go to the government in whose territory the issuer is located. That is, if the United States vests the obligation represented by a bond of American issue and the Netherlands seizes the bond itself, the certificate is to be released to the United States. This same rule is applied to other negotiable instruments. Annex, Art. 3.[34]

Earlier attempts to deal with the problem of post-war claims have also been in the diplomatic sphere. The problem is a characteristic subject of treaty provisions.[35] Provisions dealing with claims arising out of the vesting or seizure of "external assets" are found in the post-World War II

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[34] The text of the Agreement is set forth in *State Department Bulletin*, January 4, 1948, Vol. 18, No. 444, p. 6; Article I of the Annex appears on p. 7 and Article 3 on p. 8. For announcement of the going into effect of the Agreement, see *State Department Bulletin*, Feb. 19, 1951, Vol. 24, No. 607, p. 293.

[35] See the testimony of Assistant Attorney General Warren in 1917, *supra*, pp. 32-33, p. 25.

Treaties with Italy (61 Stat. (Part 2) 1369), Roumania (61 Stat. (Part 2) 1799), Bulgaria (61 Stat. (Part 2) 1953), and Hungary (61 Stat. (Part 2) 2109), as well as in the as-yet unratified treaty with Japan.[36] In a closely related field, claims of the inhabitants of Germany are dealt with in Law No. 63 of the Allied High Commission, dated August 31, 1951.[37]

The problem was dealt with comprehensively in the same manner following World War I. The Treaty of Berlin (42 Stat. 1939), signed in 1921, outlawed suits by former enemy nationals in the courts of their own country or elsewhere. That Treaty (Arts. I and II) incorporated certain provisions of the Treaty of Versailles, including those of Articles 297 and 298 and the Annex, by which, *inter alia*, it was agreed that "no claim or action" should be brought "by any German national wherever resident" against any Allied or Associated Power or against any person "in respect of any act * * * with regard to his property" under "exceptional war measures".[38] These provisions

[36] The text of the Treaty is found in *Department of State Bulletin*, Vol. 25, August 27, 1951, pp. 349-354.

[37] Law No. 63, Clarifying the Status of German External Assets, etc. Official Gazette of the Allied High Commission for Germany, No. 64, Sept. 5, 1951.

[38] The important provisions are quoted in *Klein* v. *Palmer*, 18 F. 2d 932 (C. A. 2). For application of the provisions by the courts of this country see also, *United States* v. *Chemical Foundation*, 272 U. S. 1, 11; *Munich Reinsurance Co.* v. *First Reinsurance Co.*, 6 F. 2d 742, 747-749 (C. A. 2).

would plainly have barred any "claim or action" against the obligor of a bond for recognizing a seizure by the Custodian and either paying him or issuing a new instrument to him.

The primary importance of these agreements and treaties is that they show that historically, in the course of dealing with "post-war" claims as a practical matter, the United States has always sought to protect the property abroad of its citizens by means of diplomacy. Neither in World War I nor in the present conflict, until the opinion of the Court of Appeals in this case, has there been any suggestion that the Constitution imposes upon the United States a judicially cognizable obligation to respond for such losses, that it must choose between providing recourse for those who may be held twice liable or foregoing seizure as a weapon of economic warfare.

Secondarily, the agreements and treaties are important in providing a basis for the assessment of the risk to which the petitioners are subjected. On the evidence, it appears that the Court of Appeals went too far in saying that it "is to the last degree uncertain whether * * * any foreign court" will accept payment to the Custodian as a valid discharge (R. 59). The probability is that a number of foreign courts will.[39] That petitioners *may* be held liable in some courts is admitted; no absolute assurance can be given or is required.

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[39] See also, *supra*, p. 40.

"The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable". *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 145.

CONCLUSION

The obligations vested were property within the United States which the Custodian was authorized to vest and enforce. The vesting of the obligations meets no constitutional objection and raises no duty on the part of the United States to pay just compensation in the unlikely event petitioners are held liable abroad.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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DECEMBER, 1951

APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction

referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * * *

2. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1, et seq:

* * * * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 616:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of

credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, adminstered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the

manner herein above provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

SEC. 7.

(a) * * *

Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of

enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the Alien Property Custodian by written statement under oath containing such particulars as said custodian shall require. * * *

(b) Nothing in this Act contained shall render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for or on account of, or on behalf or for the benefit of an enemy performed or engaged in since the beginning of the war and prior to the passage of this Act, or any such act or transaction hereafter performed or engaged in, except as authorized hereunder, which would otherwise have been or be void, illegal, or invalid at law. No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section three hereof, made after the passage of this Act, and not under license as herein provided shall confer or create any right or remedy in respect thereof; and no person shall by virtue of any assignment, indorse-

ment, or delivery to him of any debt, bill, note, or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy have any right or remedy against the debtor, obligor, or other person liable to pay, fulfill, or perform the same unless said assignment, indorsement, or delivery was made prior to the beginning of the war or shall be made under license as herein provided, or unless, if made after the beginning of the war and prior to the date of passage of this Act, the person to whom the same was made shall prove lack of knowledge and of reasonable cause to believe on his part that the same was made by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy; and any person who knowingly pays, discharges, or satisfies any such debt, note, bill, or other obligation or chose in action shall, on conviction thereof, be deemed to violate section three hereof * * *.

* * * * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on account of, or on behalf

of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall held, administered and disposed of as elsewhere provided in this Act.

* * * * * *

(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The Alien Property Custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the

Alien Property Custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the Alien Property Custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee. * * *

SEC. 9.

* * * * * * *

(n) In the case of property consisting of stock or other interest in any corporation, association, company, or trust, or of bonded or other indebtedness thereof, evidenced by certificates of stock or by bonds or by other certificates of interest therein or indebtedness thereof, or consisting of dividends or interest or other accruals thereon, where the right, title, and interest in the property (but not the actual certificate or bond or other certificate of interest or indebtedness) was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, if the President determines that the owner thereof or of any interest therein has acquired such ownership by assignment, transfer, or sale of such certificate or bond or other cer-

tificate of interest or indebtedness, (it being the intent of this subsection that such assignment, transfer, or sale shall not be deemed invalid hereunder by reason of such conveyance, transfer, assignment, delivery, or payment to the Alien Property Custodian or seizure by him) and that the written consent provided for in subsection (m) has been filed, then the President may make in respect of such property an order of the same character, upon the same conditions, and with the same effect, as in cases provided for in subsection (b), including the benefits of subsection (c).

SEC. 40 [50 U. S. C. App., Supp. IV, 40]. The President, or such officer or agency as he may designate, is authorized to conclude and give effect to agreements to further the amicable and expeditious settlement of intercustodial conflicts involving enemy property * * *

3. Executive Order No. 9095, March 11, 1942, 7 F. R. 1971, as amended by Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, and by Executive Order No. 9567, June 8, 1945, 10 F. R. 6917:

* * * * * * *

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President. * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * * *

(c) Any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof: *Provided, however,* That with respect to any such country or national other than Germany or Japan or any national thereof, such property or interest shall not include cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof;

* * * * * *

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency, or instrumentality to exercise any of the power or authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the Enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3 (a) and 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No persons affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien

Property Custodian rather than the Secretary of the Treasury or vice versa.

4. Department of Justice press releases:

A. January 19, 1951.

Attorney General J. Howard McGrath and Secretary of State Dean Acheson today announced important changes in the foreign funds blocking controls by the amendment of General Ruling No. 5 and the issuance of a new General Ruling No. 5B which are designed to enable completion of the program of assisting in the recovery of securities looted by the Germans during the war. They stated that holders of securities which are listed in the appendix to General Ruling No. 5B will face vesting action at the end of six months which will nullify their rights in those securities if they do not deposit them promptly with the Federal Reserve Bank of New York.

Harold I. Baynton, Assistant Attorney General and Director of the Office of Alien Property, Department of Justice, explained that the list of looted securities, which was appended to General Ruling No. 5 before the new amendment, has been revised by transferring therefrom to the list appended to General Ruling No. 5B all securities of United States issue and designating them as "domestic scheduled securities." The only securities

which remain in the list appended to General Ruling No. 5, he explained, are those of foreign issue which are described as "foreign scheduled securities." Mr. Baynton stated that the domestic scheduled securities which are not deposited with the Federal Reserve Bank of New York, as stipulated by the new ruling, will be canceled and new certificates required to be issued in replacement. He added that an opportunity will be provided for the victims of looting to assert their claims to the new certificates as well as to those securities which are deposited.

The policy of restoring enemy looted securities, said Mr. Baynton, was expressed in the Inter-Allied Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, of January 5, 1943, and in Resolution No. VI of the United Nations Monetary and Financial Conference held at Bretton Woods July 1 to 22, 1944, in both of which the United States joined. In line with this declared policy, he stated, a list of scheduled securities was promulgated in July 1947, as part of General Ruling No. 5, representing a compilation of lists of enemy looted securities furnished after termination of hostilities by the governments of countries which had been overrun by the Germans.

The new General Ruling No. 5B, Mr. Baynton explained, makes clear that all trading in domestic scheduled securities is prohibited unless licensed and that the purchaser's lack of actual knowledge of the prohibition against trading is not material. Furthermore, he added, by its terms the new Ruling requires the deposit of all domestic scheduled securities wherever located with the Federal Reserve Bank of New York.

Mr. Baynton emphasized that all persons within the United States holding or receiving securities contained in the list of domestic scheduled securities are required to deposit them in the Federal Reserve Bank of New York either directly or by returning them for that purpose to the persons in the United States from whom they were acquired. Those persons who are not within the United States, he added, are also required to deposit their domestic scheduled securities in the Federeal Reserve Bank if they wish to avoid nullification of their rights in such securities.

Mr. Baynton pointed out that the provisions of General Ruling No. 5 have been changed to make clear that all trading in foreign scheduled securities by persons within the United States or subject to the jurisdiction of the United States is prohibited, and that such persons' lack of actual knowledge of the prohibi-

tion is not material. Individuals within the United States who receive or hold foreign scheduled securities, he added, are required to deposit them with the Federal Reserve Bank of New York and persons outside the United States are permitted to do so. He stated that the ultimate action which will be taken with respect to undeposited foreign scheduled securities has not been determined pending discussions with the countries of issue.

Any depositor of domestic or foreign scheduled securities, Mr. Baynton continued, will have an opportunity to attempt to establish that he is an innocent purchaser and upon establishing that fact to the satisfaction of the Office of Alien Property, the securities deposited by him will be removed from the restrictions imposed against them under the Rulings. Furthermore, he added, any holder may, after depositing them with the Federal Reserve Bank of New York, obtain from the Office of Alien Property the name of the original owner or the government which was responsible for placing them on the lists of domestic and foreign scheduled securities, and work out a settlement with such owner or government in accordance with such rights as he and the original owner of the securities might have. It was further stated by Mr. Baynton that the Netherlands Government, which had reported

for inclusion in the lists a large majority of the securities now contained therein, has advised the Office of Alien Property that it maintains an office at 25 Broadway, New York, New York, which is authorized to effect such settlements.

A press release is being issued by the State Department, in coordination with the Department of Justice, announcing the signing of a "Memorandum of Understanding between the Government of the United States of America and the Government of the Netherlands regarding claims by the Government of the Netherlands to looted securities." The memorandum sets forth the arrangements between the United States and The Netherlands with respect to domestic and foreign scheduled securities by The Netherlands.

B. October 4, 1951.

Attorney General J. Howard McGrath announced today that in accordance with the program made public on January 19, 1951 the Department of Justice has vested approximately $3,000,000 of securities of United States issue reported to have been looted by the Germans during the occupation of the Netherlands. These securities are included in the list of "domestic scheduled securities" appended to General Ruling No. 5B and have not

been deposited with the Federal Reserve Bank of New York in accordance with the provisions of that Ruling. As a result of this action, the United States Government has taken title to the vested securities and the rights of the holders of such securities have been nullified.

Harold I. Baynton, Assistant Attorney General, Director, Office of Alien Property, Department of Justice, stated that the program made public on January 19, 1951 was designed to enable the completion of this Government's efforts to assist in the recovery of securities looted by the Germans during the war. The policy of restoring enemy looted securities was expressed in the Inter-Allied Declaration Regarding Forced Transfers in Enemy-Controlled Territory, of January 5, 1943, and in Resolution No. VI of the United Nations Monetary and Financial Conference held at Bretton Woods July 1 to 22, 1944, in both of which the United States joined.

Mr. Baynton pointed out that the vesting action, which applies to the securities looted from The Netherlands, covers most of the securities on the list of domestic scheduled securities and that the remaining domestic scheduled securities which have not been deposited with the Federal Reserve Bank of New York and which were reported by other foreign